

NAVAJO NATION,	:	Order Docketing and Dismissing
Appellant	:	Appeal
	:	
v.	:	
	:	Docket No. IBIA 91-106-A
NAVAJO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	July 11, 1991

On July 2, 1991, the Board of Indian Appeals (Board) received a notice of appeal from the Navajo Nation (appellant), through counsel, Eric N. Dahlstrom, Esq., Tempe, Arizona. Appellant seeks review of an interim order entered on June 17, 1991, by the Navajo Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning a dispute relating to the employment practices of the Arizona Public Service Company (APS) at the Four Corners Power Plant (power plant), located near Farmington, New Mexico, on the Navajo Indian Reservation.

The appeal is docketed under the above case name and number which should be cited in all future correspondence or inquiries regarding the matter. The Board finds, however, that the circumstances of this case require that the appeal be dismissed.

From the documents submitted with appellant's notice of appeal, which represent the only information before the Board, it appears that several suits relating to this matter have been filed in various forums. On May 6, 1991, the United States District Court for the District of Arizona dismissed Arizona Public Service v. Kirk, CIV 90-1542 PCT EHC. 1/ APS had sought "to have the Court declare that [appellant's] enforcement of the Navajo Preference in Employment Act * * * [was] violative of Title VII and in conflict with and preempted by the National Labor Relations Act, 29 U.S.C. § 151 et seq." (May 6, 1991, order at page 3.) In dismissing the action, the court indicated that the tribal court, whose jurisdiction was being challenged by APS, should be given the initial opportunity to decide its own jurisdiction. Navajo Nation v. Arizona Public Service Company, No. WR-CV-283-90 (D. Nav. filed Nov. 9, 1990), is still pending in Navajo Tribal Court, and its proceedings are the subject of the Area Director's June 17, 1991, interim order.

1/ The notice of appeal indicates that the district court's dismissal order has been appealed to the United States Court of Appeals for the Ninth Circuit. The dismissal order indicates that a related suit was filed by APS on Nov. 26, 1990, Arizona Public Service v. Aspaas, CIV 90-1080 PCT RCB (D.Ariz.).

The leases which gave APS the right to use certain lands on the reservation for the power plant were amended in 1966. It appears that an arbitration proceeding under section 32 of the amended leases was begun by the Area Director or another Department of the Interior official in November or December 1990. It further appears to be APS' position that all disputes arising under the leases are subject to resolution through arbitration. On May 7, 1991, the Area Director identified the issues before him and set a briefing schedule. He granted an extension of time to appellant for the filing of its brief. The week before appellant filed its brief with the Area Director, it filed an application for default judgment in the case pending in Navajo Tribal Court. According to the Area Director, the entry of judgment by that court would alter the status quo between appellant and APS and would interfere with the production of a full and complete record before him, thus hindering and disrupting the administrative process.

Accordingly, the Area Director stated at pages 2-3 of the June 17, 1991, interim order:

I order the Navajo Nation, its offices, employees, attorneys and agents to cease and desist from taking administrative or judicial action against Arizona Public Service Company. I further order that the Notice of Application for Entry of Default Judgment be withdrawn by the Navajo Nation which it filed in Navajo District Court. I further order the judiciary of the Navajo Nation shall not issue any order against Arizona Public Service Company on its own motion. Nothing in this Order shall prevent the Navajo Nation from vigorously asserting its rights in any Federal or State Court or before any officer or Board of the United States. [2/]

The Area Director's letter specifically stated at page 3 that it was an interim order, which "shall remain in effect until the tenth day following the receipt of the Area Director's decision by the Attorney for [APS] or the fifteenth day following the Area Director's decision, whichever occurs first." The letter included information indicating that the interim order could be appealed to the Board.

The Board does not normally consider interlocutory appeals. 43 CFR 4.28, however, provides for interlocutory appeals from decisions of administrative law judges under certain extraordinary circumstances:

There shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from [the Board] and an administrative law Judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question

2/ The letter also ordered APS to cease and desist from certain actions and/or practices. This aspect of the letter is not at issue in this appeal.

of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Board.

No similar regulation specifically grants the Board authority to review interlocutory rulings of BIA officials. The Board has only that authority delegated to it by the Secretary of the Interior. The Board finds that it does not have authority to review the Area Director's interim order.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the interior, this appeal from the Navajo Area Director's June 17, 1991, interim order is dismissed.

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge